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No. 09-944

Supreme Court, U.S.
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In the Supreme Court of the United States

PLACER DOME, INC. AND BARRICK GOLD CORPORATION,

Petitioners,

v.

PROVINCIAL GOVERNMENT OF MARINDUQUE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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INTRODUCTORY STATEMENT

As the petition sets forth, this case presents two recurring questions of great practical significance on which the federal judiciary sorely needs this Court's guidance. Respondent's opposition merely underscores the urgency and importance of this Court's review. On the one hand, respondent contends that the critical issue of subject matter jurisdiction in this case – the federal common law of foreign relations – was not decided by either the district court or the court of appeals and, moreover, that the district court "conducted none of the necessary fact-finding to establish jurisdiction on that basis." Br. in Opp. at 1-2. *See also id.* at 8, 27. On the other hand, respondent contends that the sequencing of issues permitted by *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422 (2007) – *forum non conveniens* before subject matter jurisdiction – is not even implicated here because both lower courts ruled on subject matter jurisdiction. Br. in Opp. at 1. That internal inconsistency in respondent's argument permeates the entire brief in opposition, which, ultimately, offers no justifiable basis for denying certiorari.

I. RESPONDENT CANNOT RECAST THE FUNDAMENTAL NATURE OF THE CASE

At the outset, the Court should be mindful of respondent's rhetorical legerdemain that seeks to recast the case as something that it is not. At no point in its opposition brief does the Provincial Government ever identify the mine operator and

alleged tortfeasor by name – *i.e.*, Marcopper Mining Company. To do so, of course, would highlight the undisputed fact that the mining company whose conduct is challenged was a Philippine entity owned in largest part either by Philippine government officials or agencies. Pet. App. 122a.

Also missing from the brief in opposition is the word "Canada," even though petitioner Placer Dome, Inc. was a Canadian company headquartered in Canada and continued to be a Canadian company when it was amalgamated with petitioner Barrick.[1] Instead, respondent refers to Nevada as "the operational center of Barrick's worldwide operations" (Br. in Opp. at 4) – an assertion that is incorrect, unsupported by the record, and wholly irrelevant to the issues presented in the petition. *Cf. Hertz Corp. v. Friend*, No. 08-1107 (U.S. Feb. 23, 2010).

Respondent's creative wordsmithing cannot transform the essential nature of this case: a lawsuit by a provincial government of the Republic of the Philippines that challenges actions by a Philippine company (Marcopper) in which, at all relevant times, the largest shareholder was either the President of

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[1] Respondent refers briefly to petitioners' "remarkabl[e]" argument in the lower courts for dismissal under *forum non conveniens* in favor of a British Columbia forum. Br. in Opp. at 6-7. The suggestion of a Canadian forum could be considered remarkable only if one ignores, as respondent does, that Placer Dome was a Canadian company that amalgamated with "old" Barrick Gold Corporation to form another Canadian company – *i.e.*, "new" Barrick Gold Corporation. Pet. App. 25a.

the Philippines[2] or the Philippine Commission on Good Government. Pet. App. 94a.

In short, this case is principally an internal dispute between different levels of the Philippine government. The underlying claims, therefore, directly implicate delicate issues of foreign relations. Indeed, the case has the potential to entangle the judiciary of this country in disputes over regulatory and policy decisions made by the federal government of the Philippines concerning the extraction of natural resources that were unpopular with provincial governments of the Philippines. Under settled principles, subject matter jurisdiction to

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[2] Marcopper was owned and managed by a number of presidential administrations. The complaint expressly challenges actions of the Philippines government under the administrations of Presidents Ferdinand Marcos (1965-1986), Corazon Aquino (1986-1992), and Fidel Ramos (1992-1998). The complaint alleges that Marcopper was involved in destructive mining activities in the Province of Marinduque from 1964 to 1997, thus extending long after Marcos' departure. Pet. App. 114a-115a. Two of the three environmental disasters alleged in the complaint – the 1993 Maguila-Guila Dam collapse and the 1996 Boac River tailings plug collapse, which the brief in opposition (at 3) labels the "most cataclysmic" – occurred when President Ramos was in power many years after President Marcos had been removed. Moreover, the operating permits that the complaint challenges were renewed annually by the national government and attempts to revoke those government-issued permits were rebuffed by the Aquino administration. Pet. App. 128a, 129a.

decide whether the case should proceed rests in a United States district court rather than a state court.

Another inherent foreign relations aspect of the case is whether the United States, through its courts, should prescribe rules of conduct and liability under foreign law for Canadian companies that invest in non-U.S. entities. In this regard, the Court must be mindful of the fact that petitioner Placer Dome was merely a minority shareholder of the Marcopper company. Indeed, Philippine law strictly limited the extent of non-Philippine ownership. Pet. App. 122a.

By their very nature, the Provincial Government's claims as alleged in the complaint raise foreign relations issues posing complex questions of subject matter jurisdiction of the type that *Sinochem* contemplated. In reversing the district court's decision that *forum non conveniens* was the appropriate basis for disposition of this case, the Ninth Circuit drastically curtailed the discretion that *Sinochem* expressly provided. Certiorari is warranted to ensure the maintenance of a proper balance between trial and appellate courts in their exercise of sound discretion.

II. UNDER ANY VIEW OF THE RECORD, SIGNIFICANT QUESTIONS MERIT THIS COURT'S ATTENTION

The nuances and complexities in the procedural history of this case serve only to broaden the potential impact of a decision by this Court. To be sure, the timing of this Court's decision in

Sinochem affected the timing and sequencing of the district court's decision-making process. The district court's initial, pre-*Sinochem* decision to deny remand to state court noted that subject matter jurisdiction existed under the Act of State doctrine. Pet. App. 8a.

Having found a basis for federal jurisdiction, the district court did not address the additional grounds upon which petitioners asserted removal jurisdiction in federal court.[3] Accordingly, as the Provincial Government repeatedly asserts in opposing certiorari, the district court never engaged in the complex fact-finding necessary to rule on the existence of jurisdiction under the federal common law of foreign relations. Br. in Opp. at 1, 2, 7 n.10, 8, 27, and 31. Nor did the district court address the further complexities of ascertaining personal jurisdiction. *Id.* at 8.

Rather, once *Sinochem* was decided, the district court immediately recognized the wisdom of this Court's guidance, stayed all discovery on personal jurisdiction, and moved directly to consider *forum non conveniens* as a basis for dismissal.[4] ER 1547. In opting for that sequence of issues, the district court expressly relied upon the discretion afforded by *Sinochem*. *Id.*

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[3] *See* Ninth Circuit Excerpt of Record ("ER") at 2094, 2095, 2098, 2104-15, 2855, 3019.

[4] Barrick did not "drop[] its personal jurisdiction motion in favor of a new motion", as the Province incorrectly asserts. Br. in Opp. at 6-7. Rather, the district court stayed the issue of personal jurisdiction. ER 1547.

Under any view of the district court proceedings, this case presents important questions regarding the proper application of *Sinochem* by federal trial and appellate courts. Consider the possible scenarios:

- If, as petitioners contend, the district court eventually concluded that it could reach *forum non conveniens* without resolving all aspects of subject matter jurisdiction, then this case presents a straightforward application of *Sinochem*. The Ninth Circuit's reversal precipitously restricts the very discretion that this Court conferred upon district courts to use the most efficient, expeditious sequencing in each case. That determination necessarily raises important questions regarding the scope of appellate review over *Sinochem* discretion.[5]

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[5] There is no merit to respondent's contention that any discussion of subject matter jurisdiction in *Sinochem* was merely *dicta*. Br. in Opp. at 19 n.41. This Court granted review in *Sinochem* specifically for the purpose of determining "whether *forum non conveniens* can be decided prior to matters of jurisdiction." 549 U.S. at 428-29. The Court held that, "where subject-matter or personal jurisdiction is difficult to determine, and forum non conveniens considerations weigh heavily in favor of dismissal, the court properly takes the less burdensome course." *Id.* at 436. This cannot be read as *dicta* because it is both the answer to the question the Court was reviewing and the essence of the Court's decision. In any event, if the references in *Sinochem* to subject matter jurisdiction were *dicta*, there would be even more reason to grant certiorari in this case so that this Court could definitively resolve the question.

- If, as the Provincial Government contends and the Ninth Circuit concluded, the district court decided at least some aspects of subject matter jurisdiction, then the case presents additional vital questions of the proper scope of review. Does the appellate court have free rein to decide issues of subject matter jurisdiction that the district court, relying on *Sinochem,* chose not to consider? More specifically, is the appellate court empowered to resolve aspects of jurisdictional questions on which the district court, to use respondent's description, "conducted none of the necessary fact-finding"? Br. in Opp. at 1. And, what standard governs the appellate court's analysis of the question whether the district court should have decided all potential bases for subject matter jurisdiction? Does the appellate court itself have discretion to employ a different sequence?

On this last point, *Pearson v. Callahan,* 129 S. Ct 808 (2009) is informative, since it conferred discretion on both the district court and the court of appeals to decide the appropriate decisional sequence. Accordingly, the interplay of those two separate exercises of discretion poses compelling questions regarding the scope of review that this Court should decide.

In any event, a fundamental question remains that this Court should resolve: Under what circumstances may the appellate court proceed to decide *forum non conveniens* first, even if the district court did not proceed in that manner? Here, the Ninth Circuit did not attempt to utilize the appellate discretion this Court described in *Pearson.*

The operational point is simple. In a case in which the clearly correct path is to dismiss on grounds of *forum non conveniens* in favor of the available adequate forum proposed by petitioners, the district court chose the most efficient, expeditious course available at the time of decision. Contrary to the holding in *Sinochem* and the principles also articulated in *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999) and *Pearson*, the Ninth Circuit charted a more circuitous, laborious and time-consuming course. This Court's review is fully warranted to ensure that the lower courts can achieve the salutary objectives that informed *Sinochem*, *Ruhrgas*, and *Pearson*.

III. THE EXISTING SPLIT AMONG THE CIRCUITS SHOULD BE RESOLVED

The Provincial Government's opposition to certiorari on the issue of using the common law of foreign relations as a basis for subject matter jurisdiction is entirely incorrect. First, and contrary to respondent's contention, the assertion of a split in the circuits on this issue is not a late-breaking development conjured up only for purposes of certiorari. It is the strongest type of circuit conflict: one explicitly recognized by the court of appeals. The Ninth Circuit's decision in *Patrickson* addresses the conflict, expressly disagreeing with the decisions of the Second, Fifth and Eleventh Circuits. *Patrickson v. Dole Food Co.*, 251 F.3d 795, 800-03 (9th Cir. 2001). Accordingly, the conflict that petitioners raise in this Court was well known to the Ninth Circuit. Of course, since this case was litigated in the Ninth Circuit, attention in the lower courts naturally

focused on Ninth Circuit precedent rather than on the decisions of other appellate courts with which the Ninth Circuit had already disagreed.

Second, again contrary to respondent's contention, the federal common law of foreign relations was consistently and repeatedly asserted as a basis for federal jurisdiction in both the district court and the court of appeals. *See* note 3, *supra*.[6] As is evident from the decision below, however, there is considerable disagreement and confusion in the federal courts over two concepts: the Act of State doctrine and the federal common law of foreign relations. Although both implicate some similar concerns, there are differences.

The Act of State doctrine is typically employed as a basis for defeating federal jurisdiction. Thus, cases decided under that rubric often turn on justiciability questions regarding the authority of a United States court to sit in judgment of acts taken by sovereign governments within their own territory. *See e.g., Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 416 (1964) (applying act of state doctrine in a financial dispute involving the nationalization of a sugar company in Cuba).

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[6] The basis for federal jurisdiction was also discussed at length in petitioners' brief to the Ninth Circuit on appeal. *See* Brief of Appellees at 53-60, *Provincial Gov't of Marinduque v. Placer Dome, Inc.*, No. 07-16306 (9th Cir. Sept. 15, 2008).

Confusion can easily ensue when Act of State terminology is employed as a basis for establishing federal subject matter jurisdiction. *Patrickson* expressly points to such affirmative use of Act of State principles. 251 F.3d at 800 n.2. As is evident from *Patrickson* and from the decision below in this case, however, it would become entirely circular for the Act of State doctrine to have the same meaning in the jurisdiction-establishing and the jurisdiction-defeating contexts. In that event, subject matter jurisdiction would exist under the Act of State doctrine only in cases subject to dismissal under the Act of State doctrine. The operative rule, therefore, cannot require the party asserting jurisdiction to show – as a predicate for subject matter jurisdiction – that adjudication of the claims requires a federal court to sit in judgment of the acts of a foreign sovereign within its own territory.

Nor does it help nominally to invoke another doctrine – such as the federal common law of foreign relations – and then to make that doctrine co-extensive with the Act of State doctrine. In the view of the Ninth Circuit, subject matter jurisdiction exists only where "a court must decide – that is, when the outcome of the case turns upon – the effect of official action by a foreign sovereign." Pet. App. 12a (quoting *W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp.*, 493 U.S. 400, 406 (1990)). By applying a doctrine – Act of State – normally used to defeat jurisdiction, the Ninth Circuit makes the analysis altogether circular.

This case provides a suitable opportunity for this Court to resolve the existing confusion by

employing more discerning terminology and analysis. In the present circumstances, the federal common law of foreign relations offers a more direct, more accurate, and more understandable mode of analysis that plainly applies to this case. A case such as this one – in which a foreign provincial government challenges actions by an entity in which officials and agencies of that country's national government owned the largest share – surely poses questions of foreign relations. Moreover, the actions challenged in the complaint were authorized, approved, and acquiesced in by multiple Philippine administrations over the course of decades. *See* note 2, *supra*. Furthermore, the only defendants in the case are Canadian companies (one of which held an indirect minority interest at one time in the Philippine company that is alleged to be the tortfeasor). In light of these facts, it is clear that the foreign relations issues implicate not only United States-Philippine relations, but United States-Canadian relations as well.

On this record, there should be no doubt that a federal court has subject matter jurisdiction to consider these questions. Even if a district court ultimately determines that dismissal is warranted under the Act of State doctrine or *forum non conveniens*, there is no basis for denying that court the threshold jurisdiction to make those rulings.

In short, there are vitally important reasons for this Court to grant certiorari, to resolve the existing conflict among the circuits, and to dissipate the confusion that has befuddled lower courts in analyzing jurisdiction under the federal common law

of foreign relations. This case is an ideal vehicle for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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